UNIVERSITI KEBANGSAAN MALAYSIA v. ZAINAL ABIDIN BIN AHMAD & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 8 September 1987 & 16 April 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 90 of 1986]

Contract – Guarantee – Study leave given to tutor to obtain doctorate – Agreement to pursue course diligently and on completion of course to serve university for a period of years – Guarantee of performance of obligation – Return of tutor without completing course – Disappearance of tutor – Tutor subsequently dismissed for misconduct – Claim under agreement – Course of training abandoned with consent of university – Subsequent service not under agreement.

University – Tutor sent on study leave to obtain doctorate – Course not completed – Tutor returning to serve university – Disappearance of tutor – Tutor subsequently dismissed for misconduct – Whether agreement to serve university after completion of course of study still subsisting – Liability of guarantors.

In this case, a tutor in the University Kebangsaan Malaysia had been given study leave on being awarded a scholarship to do a Ph.D. He was unable to complete his course and, after extensions of his study leave, returned to serve the University. He subsequently disappeared and he was dismissed for misconduct. An agreement had been entered into between the tutor and his two guarantors (the respondents) and the University whereby the University agreed to defray the cost of the Ph.D. course and the tutor agreed to pursue the course diligently and on completion of the said course to return to Malaysia and serve the University for a number of years. The respondents agreed to guarantee the performance of the agreement by the tutor. As the tutor had been dismissed for misconduct, the University sued the tutor and the guarantors for the refund of the sum spent by the University. The learned President of the Sessions Court gave judgment for the University-appellant but suggested that the guarantors-respondents should not be made liable for salaries and E.P.F. On appeal to the High Court, the claim of the University-appellant was dismissed. The appellant appealed to the Supreme Court.

Held, dismissing the appeal: (1) in this case the tutor had abandoned his course of study with the consent of the University and the subsequent service was not under the agreement;

(2) as he had not obtained his Ph.D. but was recalled to continue his service to the University and he behaved in the way he did and was dismissed following the disciplinary proceedings, the sureties cannot be faulted.

SUPREME COURT.

Ang Saik Hoon (Miss) for the appellant.

A. Fadzil Omar for the first respondent.

G. Joseph for the second respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (delivering the judgment of the court): This appeal is against the decision of Harun J. in allowing an appeal from the Sessions Court in respect of a guarantee.

Syed Alwi bin Syed Mohd. Shabab (the first defendant) was a tutor in the Universiti Kebangsaan Malaysia (the plaintiff/appellant). He was given study leave on being awarded a scholarship to do a Ph.D. in Philosophy of Education at the prestigious Stanford University, California for a period of two-three years from September 1973. As he was unable to complete his Ph.D. within the specified period, he applied for extension of his scholarship for another year. This was granted. Finding that he could not complete it, he applied for a further extension of seven months. This was also granted. A final extension till October 1978 was granted. He returned to Malaysia and reported for duty with the plaintiff on 13 October 1979 as a tutor. He remained until 25 December 1979 and then disappeared. He was subsequently dismissed from the service of the plaintiff for misconduct. Consequently, the plaintiff sued the three defendants.

An agreement dated 19 September 1973 was entered into between the plaintiff and the three defendants whereby the plaintiff agreed to defray the cost of the Ph.D. course in Stanford University in the United States of America including certain allowances and the first defendant agreed to pursue the said course diligently and on completion of the said course to return to Malaysia and serve the plaintiff for a period of years calculated in accordance with the terms of the said agreement. The second and third defendants (the first and second respondents) agreed to guarantee the performance of the obligation of the first defendant under the said agreement.

As the first defendant has been dismissed for misconduct, the plaintiff says that the three defendants are jointly and severally for themselves, their heirs, executors or assigns liable to refund to the plaintiff on demand all monies which have been expended by the plaintiff in respect of the said course or the sum of $50,000, whichever is greater. The plaintiff claims for the sum of $196,591.30. In the alternative, the plaintiff contends that by being sureties the second and third defendants have become principals to the said agreement and are jointly and severally liable for the sum of $196,591.30.

Both the second and third defendants denied the claim by the plaintiff. It is their contention

that the first defendant is to serve the plaintiff only after he has first completed the said course. There is no evidence that he has obtained his Ph.D. Therefore, the defendants are not liable under the said agreement. Another point is that the alleged misconduct was not done within the period of years during which the first defendant had agreed to serve the plaintiff as expressly stated under the said agreement. Further, the said agreement was varied without the knowledge and consent of the defendants.

Two relevant clauses of the said agreement may be set out. Clause 1(1) provides as follows:

"1. The tutor hereby covenants that:

(1) he will enter upon and diligently continue in the course of training specified in the schedule to this agreement and that he will complete the said course of training within the time prescribed in the said schedule or such longer time as the university may approve;"

The relevant items set out in the schedule are that the course of training is Ph.D. and the prescribed time is two-three years. Clause 7 provides as follows:

"7. It is further declared and agreed that if the tutor:

(1) ...

(2) ...

(3) is dismissed from the Universiti service for misconduct, negligence or indifference to his duties within the period of years during which he has agreed to serve the Universiti under this agreement; or

(4) ...

then and in any such case the tutor and the sureties shall be jointly and severally liable or themselves, their heirs, executors or assigns to refund to the Universiti on demand the sum of ... $50,000 if his course of training is for Ph.D. degree or a specialist qualification in the case of medical officers or is a course of training which takes more than two years to complete or the sum of all monies which have been paid to the tutor or on his behalf by way of allowances or otherwise and all other monies expended or for which liability has been incurred, by the Universiti by way of fees, passages, fares or otherwise in connection with or arising out of this agreement, whichever is more."

On the question of variation, the learned President stated in his grounds of judgment at p. 8 as follows:

"It is argued for the second and the third defendant that the University in extending the grant to the first defendant beyond two-three years and not informing them had varied the term of the agreement. With respect, I cannot agree with this proposition, as this is well covered by clause I, para 1 of the agreement. Further, there is no provision in the agreement which required the University to inform the two sureties, should it decide to extend the grant; after all the period of extension was not an unreasonable one."

The learned President held that there was no variation but suggested that the second and the third defendants should not be made liable for salaries and E.P.F. The learned judge disagreed and commented at p. 31 of the record of appeal thus:

"University had right to extend period of course of study but this did not absolve them from informing the sureties on the extension of time which will invariably incur a greater sum in liabilities. Extension of time substantial variation of agreement."

He therefore allowed the appeal with costs. Hence this present appeal.

The second and third defendants contended that there was no evidence to show that the first defendant completed his study. Time is important because they say that the guarantee comes into play only in respect of service after the completion of study. The agreement does not contain provisions relating to service in the event of the first defendant failing to complete his course or working before completing his course.

Paragraphs (3) and (4) of clause 7 of the agreement are clear. It would appear that the first defendant returned and assumed duties on 13 October 1979 at the instance of the plaintiff (who assumed that he had successfully completed his course), and in any case needed his services. He absented himself in February 1980, leading to the disciplinary proceedings culminating in his dismissal. The plaintiff made a belated attempt to show that the first defendant had completed his course by referring to a letter from the first defendant (p. 49 of the appeal record), the relevant part of which reads:

"2. Saya perlu mencari sabuah 'apartment' untuk kediaman isteri saya. Olih kerana saya telah selesai pengajian saya di-Stanford jawatan kuasa perumahan Stanford telah mengarah saya mengkosongkan apartment saya di Stanford ..."

We do not consider this to be sufficient proof of his obtaining of the Ph.D. Even up to the date of hearing of this appeal, we were not able to know whether the first defendant had obtained his Ph.D. or not.

The learned President, in construing paragraphs (3) and (4) of clause 7 of the agreement, made these observations at p. 5 of his judgment:

"... It is the second defendant's contention that the dismissal of the first defendant was not within the period of years during which he has agreed to serve the University. This clause could only operate against him after he had completed his course of study leading to the Ph.D. There is no evidence that the first defendant had completed his Ph.D.

On close and proper construction of this clause, one could not help but to agree with the counsel that the first defendant only agreed to serve the University on completion of his Ph.D. ..."

Indeed, he found on the evidence before him that there was no evidence that the first defendant had completed his Ph.D.

In our view, where the question is, as here, as to the sufficiency of evidence, the state of the pleadings is more important than the way in which the case is shaped in argument. Under the agreement, the first defendant agreed to serve the plaintiff for a period of years on his completion of his Ph.D. course. The second and third defendants could only be liable if the first defendant were dismissed for misconduct, negligence or indifference to his duties within the period of years of service after the completion of his Ph.D. course. This is clearly set out in paragraph (3) of clause 7 of the agreement. The first thing we would expect the plaintiff to establish was the award of Ph.D. to the first defendant. If the first defendant had completed his course there was no evidence to show that he had been awarded a Ph.D. by Stanford. We fail to see how the second and third defendants should be made liable as sureties in the circumstances. There must be a breach before liability can arise.

If the first defendant had obtained his Ph.D. and returned to work and behaved himself in the way he did he could not blame the plaintiff for his dismissal. In such a situation the sureties would be liable. However, if he had not obtained his Ph.D. but was recalled to continue in his service to the University and he behaved in the way he did, his dismissal following the disciplinary proceedings, then the sureties cannot be faulted. In such a situation, the sureties should not be made liable. The first defendant was in the service of the plaintiff as a tutor before he went to do his Ph.D. In our view, his recall to service was not a breach by the first defendant of any of the paragraphs of clause 7 of the agreement. He had abandoned his course of training with the consent of the plaintiff and the subsequent service was not under the agreement.

On his ground alone, we would dismiss the appeal with costs. Since the service after the first defendant's return is outside the ambit of the agreement, we do not consider that we need to deal with the question of variation. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Nordin Torji & Yussof Ahmad; Hazzan & Fadzil; Lawrence & Joseph, Mahalingam & Co.*

MANILAL & SONS (M) SDN. BHD. v. M. MAJUMDER

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 7 September 1987 & 25 April 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 52 of 1987]

Civil Procedure – Order of High Court restored on appeal by Privy Council – Subsequent application to High Court – Whether judge of High Court has power to alter the order of the Privy Council.

In this case, the appellant had sued the administrators of the estate of Ratnavale, deceased, for the balance of the sums alleged to be paid to the deceased. The learned judicial commissioner found in favour of the appellant and held that the money was paid to the deceased on the security of a lien and equitable charge in respect of land in Kedah. He also held that the action was not barred by limitation. On appeal, the Federal Court held that of the two sums paid to the deceased the larger amount was statute-barred and therefore allowed the appeal (see [1975] 2 M.L.J. 207). The appellant appealed to the Privy Council (see [1986] 1 M.L.J. 357) which allowed the appeal and restored the order of the judicial commissioner with the deletion of the words "on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah". Following the decision of the Privy Council, the respondent applied for an order to transfer the said Lots 290 and 461 to herself and to remove the caveats lodged by the appellant over the said land. The learned judge granted her application. The appellant subsequently applied to have the *ex parte* order vacated and set aside. The learned judge dismissed the appellant's application and confirmed the *ex parte* order. Further, the order went on to state:

"And it is also ordered that paragraph 3 of the order of the Ipoh High Court dated 22 March 1983, as restored by the Privy Council order dated 30 August 1986, imposing an injunction to restrain all dealings in Lots 290 and 461 Mukim of Kulim, Kedah be and is hereby deleted."

The appellant appealed.

Held, allowing the appeal: the learned judge has no jurisdiction to alter the decision of the Privy Council.